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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-347

ORECK CORPORATION,

Petitioner,

vs.

WHIRLPOOL CORPORATION,

AND

SEARS, ROEBUCK AND CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON Y. WEITZENFELD
MICHAEL R. TUROFF
STANLEY M. LIPNICK
PATRICK F. GEARY
ARNSTEIN, GLUCK,
WEITZENFELD & MINOW,
Of Counsel
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-7100
Attorneys for Respondent Whirlpool Corporation

ARTHUR MEDOW
CHARLES A. TAUSCHE
Sears Tower
Chicago, Illinois 60684
(312) 875-9200
Attorneys for Respondent Sears, Roebuck and Co.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Absent price-fixing, whether it is a *per se* violation of the Sherman Act for a single retailer to request of and receive from a single manufacturer an agreement to sell to it exclusively.

2. Whether a Sherman Act plaintiff who does not prove a *per se* violation has the burden of proving the anti-competitive effect of the conduct alleged to be illegal.

3. Whether the failure to object to jury instructions affects the right to appeal from erroneous denials of motions for directed verdict and for judgment n.o.v.

COUNTERSTATEMENT OF THE CASE

Petitioner was awarded a judgment in the amount of $2,250,000 plus attorneys' fees and costs on Counts I and II of a seven-count antitrust complaint (A. 37-46). A divided panel of the Second Circuit reversed and remanded for a new trial on both counts. On rehearing *en banc*, the full court, by a vote of 6-2, adhered to the original panel's judgment. Petitioner now concedes that a new trial is required on Count II (Pet. n. 2 at p. 5, n. 17 at p. 22) and asks this Court to review and reverse the Second Circuit's *en banc* judgment that the issues to be retried should also include Count I.

Respondents are Whirlpool Corporation ("Whirlpool"), a manufacturer of household appliances, and Sears, Roebuck and Co. ("Sears"), a large retail merchant. Petitioner Oreck Corporation ("Oreck") was originally a distributor and is now a direct mail retailer of vacuum cleaners. Commencing in 1963, Oreck purchased vacuum cleaners from Whirlpool (PX 3, 44; A. 82, 136-137). Whirlpool discontinued selling to Oreck in 1971 (PX 96, 99-101, A. 295-296, 441), allegedly at Sears' insistence. The fundamental difference between the majority and the dissent below, both on the original panel and on rehearing *en banc*, was whether that conduct, if true, was a *per se* violation of Section 1 of the Sherman Act.

Since 1957, Whirlpool has manufactured and sold vacuum cleaners to Sears for resale under Sears' private label "Kenmore" (A. 57, 323). Having once tried, unsuccessfully, to market vacuum cleaners under the "Whirlpool" brand (A. 57, Tr. 655-656), Whirlpool in 1963 appointed Oreck as its exclusive distributor in the United States of "Whirlpool" brand vacuum cleaners for an initial term of five years (PX 3, A. 82). The agreement provided for year to year renewals thereafter, subject to the right of either party to terminate upon specified notice to the other. Whirlpool's objective, which Oreck agreed to pursue, was to develop a channel of distribution to department stores and other key retail accounts, not only for vacuum cleaners but also for other specialty appliances which Whirlpool might thereafter produce (PX 13, A. 56-58, 76, 470-471, 473, 640-641, 769-770, 784-786).

In 1967, Oreck "switched its marketing strategy." (Pet. p. 4) It abandoned the marketing plan to which it originally agreed and which Whirlpool desired, and began selling directly to consumers by mail (A. 303-306, 407-408, 598). Its mailings represented that a vacuum cleaner was being offered for a limited time at "half price" because the consumer was a member of some special group, such as "real estate executives", "industrial executives", or a "consumer test group" (PX 60, A. 307-308, 394-395). The groups were so numerous and broad that practically the entire population fell into one or another of Oreck's "special groups", and the same "limited time offer" was mailed to the same "special groups" as many as ten times per year (Tr. 496-497).

After Whirlpool requested and Oreck refused to resume the agreed marketing strategy which Whirlpool desired for vacuums bearing its brand (A. 304-306, 407-408, 501-506, 598), Whirlpool, on June 27, 1968, notified Oreck of its decision to cancel their contract when its initial five year term ended on March 13, 1969 (DX F, A. 804, Tr. 542). Oreck threatened litigation and asked to be allowed to continue purchasing from Whirlpool for another three years to recoup its investment (A. 171-172, 176-177, 430-431, Tr. 1433). Whirlpool and Oreck then entered into a new agreement (PX 44, A. 136-137) which, unlike the original agreement, contained no renewal provision, and specifically provided that Oreck's distributorship would continue until December 31, 1971, *"at which time this Agreement shall expire"* (emphasis supplied).

As that date neared, Oreck began to order quantities of merchandise which far exceeded its forecasts or any previous orders (PX 99, 100, 101, A. 283-284, 288-289, 293-296, 441). Before expiration of the contract Oreck had built up such a sub-

stantial inventory of Whirlpool vacuum cleaners, that it continued to advertise and sell them throughout the following year (A. 445-447, 887). In fact, Oreck's president testified it may have had Whirlpool vacuum cleaners in its inventory as late as December, 1973 (A. 447), two years after its contract with Whirlpool expired.

Oreck at all times remained a viable competitor in the sale of vacuum cleaners. Long before it sold the last of its "Whirlpool" vacuum cleaners it was selling vacuum cleaners under the "Oreck" brand (A. 408, 409, 447, 889). It purchased these vacuum cleaners from a new supplier which had not previously competed in the United States. By the time of trial, Oreck was, by its own admission, the "world's largest seller of top-fill uprights" (DX U, A. 426, Tr. 540).

Nor was competition at the supplier level impaired. At all times more than twenty vacuum cleaner manufacturers competed in the United States, including the big three—Hoover, Electrolux and Eureka (PX 108, A. 878-879, Tr. 463, 465). They all continued as before. Hence, Whirlpool's termination of its sales to Oreck had only one effect upon competition—it led to an increase in the number of competing manufacturers since Oreck's new supplier had not previously sold in this country.

When the contract expired, Whirlpool also then had on hand an inventory of over 21,000 vacuum cleaners and 8,000 attachments which it had manufactured on Oreck's orders, but for which shipping instructions had never been received (PX 102, DX N, A. 289-290, 444, 518-521). At that time there was due from Oreck to Whirlpool over $220,000 for merchandise sold and delivered (A. 442-443, 580, 586-587). Oreck did not pay this debt until a state court collection action was reduced to judgment (A. 443). Contrary to Petitioner's contention (Pet. p 9), it is not irrational to refuse to continue to sell to one who has not paid for merchandise previously delivered.

As the Petition recognizes at page 16, there was never any *intra*brand competition between Oreck and Sears, even while Whirlpool was their common supplier. The only vacuum

cleaners which Whirlpool sold to Sears bore the latter's private label "Kenmore". There was no evidence that the public either knew or cared that Whirlpool was the manufacturer. The "Whirlpool" vacuum cleaners which Oreck purchased were so different from the "Kenmore" machines sold to Sears that the trial court held that they were not of like grade and quality, as a matter of law, and directed a verdict against Oreck on Robinson-Patman claims (Tr. 1371-1373). No appeal was taken from this ruling.

The prices of Oreck and Sears were poles apart, Oreck selling at substantially higher prices than Sears. While Oreck was still functioning as a distributor selling to retailers, it advertised that the public could buy "Whirlpool" upright vacuum cleaners from its retailer customers for "less than $49.95" (PX 14, A. 97-98). In 1970, the special, supposedly limited time "half-price" which it offered to the public by direct mail was $44.75 (PX 124, A. 619-620), which was increased to $46.80 and $48.60 in 1971 (PX 60, A. 394-395, 725). By contrast, the only evidence of Sears prices, introduced by Oreck itself, disclosed that Sears charged $18 to $24 for vacuum cleaners Oreck contended were comparable to those which it sold under the "Whirlpool" brand (PX 165, Tr. 906 ff., 989-994).

Counts I and II charged Respondents with violation of Section 1 of the Sherman Act, allegedly by restraining Oreck's sales of vacuum cleaners in the United States and Canada, respectively. Notwithstanding the patently pro-competitive result of the contract expiration, the trial court denied defendants' motion for directed verdict on Count I (Tr. 1325-1373, 1627-1650) and charged the jury that Whirlpool and Sears had committed a *per se* violation if Whirlpool's termination of Oreck was found to have been caused by Sears (A. 921-922, 923-924).

A *per se* charge was also given on Count II (A. 927-929). The jury was charged that defendants would be jointly liable for restraining Oreck's sales in Canada if Whirlpool's refusal to obtain Canadian Standards Association (analogous to Under-

writers Laboratories) approval of the "Whirlpool" brand vacuums sold by Oreck reflected an agreement with Sears for a territorial exclusive. This charge was given despite the facts that CSA approval was not a legal requirement for selling in Canada, and that Oreck actually made sales there (PX 39, A. 118-119, 129-132, 150-151, 154-155, 162-163, 416-418).

The jury found Respondents jointly liable on both Counts (A. 957-958).[1] The trial court denied Respondents' motion for judgment n.o.v. and entered judgment against Respondents jointly on both Counts (A. 37-46).

On appeal, a panel of the Second Circuit found it unnecessary to pass on Respondents' contentions that the record did not support a finding that Sears and Whirlpool had combined or conspired and that Oreck had failed to sustain its burden of proof of damages. The panel majority held that it was ". . . plain error which make[s] necessary a reversal of this judgment" for the trial court to have instructed the jury, as it did, that the alleged combination of Whirlpool and Sears was a *per se* violation.

The panel likened the alleged agreement between Whirlpool and Sears to an agreement for an exclusive distributorship, rejecting Petitioner's contention, embraced by the dissent, that it was a "group boycott." Because Whirlpool and Sears did not compete with one another on the same level of distribution, their agreement, assuming it existed, was held to be a vertical arrangement not *per se* illegal. The majority further noted that competition at the manufacturers' level had not been adversely affected and that Sears and Oreck had marketed vacuum cleaners under different brands, so that there was no intrabrand competition which could have been eliminated.

The majority rejected Oreck's argument that Sears was given a monopoly in the sale of vacuum cleaners made by Whirlpool,

1. Contrary to note 2 at page 5 of the Petition, the jury could not have returned a joint verdict against both Respondents on Count II on the basis of purely unilateral conduct by Whirlpool.

recognizing that there was no showing of any uniqueness of or special demand for Whirlpool vacuum cleaners as would establish a separate market or sub-market for them apart from other vacuum cleaners. Accordingly, the panel reversed the trial court's judgment and ordered the case remanded for a new trial. Judge Mansfield dissented.

On rehearing *en banc*, Judges Anderson, Mulligan, Timbers, Gurfein, Van Graafeiland, and Meskill joined to uphold the judgment of the original panel majority. Judge Mansfield again dissented, joined by Judge Feinberg. The *en banc* majority noted that there was no claim or evidence of price fixing, that alternative sources of supply were available to Oreck and all others who had wished to compete with Sears, that Oreck had obtained another supplier and had remained a viable and successful competitor in the sale of vacuum cleaners. The majority held that the alleged agreement between Whirlpool and Sears, if it existed, was not a *per se* illegal group boycott because it was not a horizontal agreement between competitors at the same level of market structure, but rather was purely vertical in nature. According to the majority, such a vertical agreement must be examined under the rule of reason. Since the rule of reason requires proof that a challenged practice has actually lessened competition, proof which Oreck did not and could not offer, the majority adopted the judgment of the original panel remanding for a new trial.[2]

The Count II allegation that, by agreement with Sears, Whirlpool had prevented Oreck from selling "Whirlpool" brand vacuum cleaners in Canada, had also received *per se* treatment by the trial court, in reliance upon *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). Subsequent to the trial, the *Schwinn* holding on which the trial court had relied was overruled by this Court in *Continental T. V., Inc.* v. *GTE Syl-*

2. Respondents believe they should have been awarded judgment rather than merely a new trial, since Petitioner failed to prove a *per se* violation and offered no evidence of anticompetitive effect under the rule of reason.

vania,, Inc., 433 U. S. 36 (1977). Both the *en banc* majority and the dissent agreed, and the Petition concedes, that the subsequent *Continental T. V.* decision requires a new trial on Count II.

The majority further held that Oreck's claims concerning the Canadian market permeated the evidence, the arguments and the charge and "inevitably prejudiced the jury's consideration of the first count. . . .", so that a new trial was required on Count I for this alternative and additional reason.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Decision Below Is a Clearly Correct Holding That a Vertical Agreement by a Single Manufacturer to Sell to a Single Retailer, Without More, Is Not a Per Se Sherman Act Violation.

The Court of Appeals followed this Court's teaching that absent price fixing, *per se* treatment is reserved for concerted refusals to deal by competitors operating on the same level of distribution. Only last year, in *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36 (1977), this Court refused to endorse *per se* treatment of non-price vertical arrangements not involving concerted action by competitors absent a showing of "demonstrable economic effect" justifying departure from the rule of reason. Petitioner concedes that it neither proved nor even attempted to prove that Respondents' conduct had any economic effect. Hence the decision below effectuates the policy of this Court applied in *Continental T. V.* and for this reason alone the Writ should not be granted.

Prior decisions relied upon by Petitioner and cited by the dissent all involved concerted action by competitors and are therefore inapposite. In *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966), several competing Chevrolet dealers conspired not to sell to discounters, and General Motors acted to enforce that agreement. No less an authority than this Court

itself has stated that *per se* treatment there rested upon the horizontal nature of the Chevrolet dealers' conspiracy. *Continental T. V., supra*, nn. 27, 28, 433 U. S. at 57, 58.[3]

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), on which Petitioner principally relies, involved a refusal to deal by *ten* appliance manufacturers and their distributors, allegedly acting in concert with one another at the behest of a retailer who competed with the plaintiff. There, too, the plurality of actors on the same competitive level was the reason for *per se* illegality. As this Court said in *Klor's*:

> "This is not a case of . . . a manufacturer and a dealer agreeing to an exclusive distributorship." 359 U. S. at 212.

Unlike *Klor's, this is* a case of a single manufacturer and a single dealer agreeing, assuming they agreed at all, to what is at most an exclusive distributorship.

Consistent decisions of the lower federal courts hold that absent price fixing, concededly not present here, an exclusive distributorship agreement between a single manufacturer, such as Whirlpool, and a single retailer, such as Sears, is not *per se* unlawful, even if an existing customer is terminated and must thereafter obtain a new source of supply. Even where a customer requests or even demands an exclusive to protect itself from the competition of others selling goods of the same manufacturer, the courts consistently hold that such arrangements are unlawful *only* if there is proof of anti-competitive effect amounting to an unreasonable restraint of trade. *Alpha Distributing Co. of California* v. *Jack Daniel Distillery*, 454 F. 2d 442, 452 (9th Cir. 1972); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418, 420 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 822 (1957); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71,

3. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), is also cited by the Petition and also involved horizontally concerted action by competitors. There all the members of the New York Stock Exchange refused in concert to provide direct wire service to the plaintiff.

76 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); *Bay City-Abrahams Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206, 1214-6 (S. D. N. Y. 1974); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 704-5 (S. D. N. Y. 1969); *Beckman* v. *Walter Kidde & Co., Inc.*, 316 F. Supp. 1321 (E. D. N. Y. 1970), *aff'd. per curiam*, 451 F. 2d 593 (2d Cir. 1971), *cert. denied*, 408 U. S. 922 (1972); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F. 2d 1093 (3d Cir. 1972); *H & B Equipment Co., Inc.* v. *International Harvester Co.*, 1978-2 Trade Cases ¶ 62,136 (5th Cir. 1978); *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F. 2d 30 (5th Cir. 1977); *Ace Beer Distributors, Inc.* v. *Kohn Inc.*, 318 F. 2d 283 (6th Cir. 1963), *cert. denied*, 375 U. S. 922 (1963); *Quality Mercury, Inc.* v. *Ford Motor Co.*, 542 F. 2d 466 (8th Cir. 1976) *cert. denied*, 433 U. S. 914 (1977); *Gough* v. *Rossmoor Corp.*, 1978-2 Trade Cases ¶ 62,202 (9th Cir. 1978). Indeed, when the terminated customer is able, as was Petitioner, to obtain an alternative source of supply and is not foreclosed from the market, the courts have refused to find an unreasonable restraint of trade. *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 146 (6th Cir. 1972).

This Court too has recognized that where, as here, there is no price fixing, a vertical exclusive sales agreement may not be held *per se* unlawful "in the presence of adequate sources of alternative products to meet the needs of the unfranchised . . .". *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 381 (1967).[4]

Even the dissent agreed "that Oreck could not establish an unreasonable restraint in the distribution of vacuum cleaners generally in the United States, since Whirlpool cleaners represent but a small percentage of the entire market" (Pet. App. 44a) and that Oreck was entitled to judgment only if it had proved a *per se* violation (Pet. App. 40a-41a). The dissent rested on the proposition that Sears and Whirlpool had combined to restrain Oreck's competition with Sears in the sale of Whirlpool-made vacuum cleaners (Pet. App. 44a) and that the legality of such combination should have been governed by decisions of this Court "that where two or more competitors agree to cut off supplies to a third, such combination or agreement" is unlawful *per se* (Pet. App. 49a). Since Whirlpool and Sears were not competitors, the decisions relied upon by the dissent are inapplicable, and the majority was clearly correct in holding that the trial court erred in its *"per se"* treatment of the alleged agreement and in failing to apply the rule of reason.

4. *Tysons Corner Regional Shopping Center*, 85 F. T. C. 970 (1975), cited by the Petition at page 14, is not inconsistent with the cases cited in the text above nor with the decision below. The Commission's decision rested on factual findings that a withheld source of supply (a shopping center location) was unique and that there was control by one competitor over the prices of another, neither of which situations are presented here.

The correctness of the majority holding is tacitly conceded by Petitioner's argument that Respondents should have been, but were not required to prove a pro-competitive justification for their conduct. Such proof is permitted only in a case governed by the rule of reason. Moreover, Petitioner's argument that pro-competitive justification was not shown, while incorrect as a matter of fact,[5] puts the cart before the horse. Since no harm to competition on any level was shown to have resulted from Respondents' conduct, there was nothing to offend the anti-trust laws and hence no reason for respondents to justify anything.[6]

Contrary to Petitioner's assertion, the Court of Appeals did not hold that *per se* instructions were erroneous because

5. The Second Circuit found evidence in the record justifying Respondents' conduct (Pet. App. 37a, n. 7)

6. Professor Bork, upon whose work Petitioner relies, supports Respondents' position. He says that a "naked restraint" is an agreement "in which the parties engage in no significant dealings *other than the elimination of competition*", whereas an "ancillary restraint" is one which *eliminates competition* but which is lawful because collateral to a legitimate transaction. Bork, *The Antitrust Paradox*, at page 27 (emphasis supplied). The alleged agreement between Whirlpool and Sears, even if it existed, as a matter of undisputable fact *did not eliminate any competition* and hence was not a restraint at all, neither a naked nor an ancillary one.

Whirlpool's decision not to renew Oreck was an exercise of contractual rights. What the Court of Appeals held was that *per se* treatment was not required because there was no group boycott, no price-fixing and no proof of "demonstrable economic effect" justifying *per se* treatment. Thus the Court held that it should not interfere with the exercise of contractual rights absent proof of an anti-trust violation under the rule of reason. (Pet. App. 40a) There was no such proof here.

Nor has the Court of Appeals created a public injury requirement as Petitioner claims. The Court of Appeals merely held that absent a *per se* violation, there must be proof of an unreasonable restraint of trade.

The sum and substance of the decision below is that an anti-competitive effect must be made to appear in an antitrust case by actual proof when, as here, the *per se* rule is not applicable. Such a decision is routine and does not require this Court's attention.

2. The Court of Appeals' Additional Ground for Ordering a New Trial of Count I Along with the Concededly Required New Trial of Count II Applied the Correct Legal Standard to a Factual Assessment of the Record as a Whole.

The Court of Appeals was unanimous in holding that a new trial is required on Count II, by reason of this Court's *Continental T. V.* decision subsequent to the trial. Where a new trial is required, a partial one is proper *only* where the issue to be retried is clearly not interwoven with other issues. *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494, 500 (1931). The determination whether to order a new trial on all issues or only on some of them is discretionary, to be based upon consideration of the record as a whole. *See*, 6A Moore, *Federal Practice* ¶ 59.06, at 59-89 (2d ed. 1974).

In holding that the Count II matter, which concededly required a new trial, so permeated the evidence, the arguments, and the charge, that it inevitably prejudiced the jury's consideration of the whole case, the Court of Appeals applied the correct legal standard and performed the kind of factual evaluation of the record as a whole which this Court traditionally does not review. There is no reason for departure from that tradition in this case and for this reason, too, the Petition should be denied.

3. Respondents' Timely Motions for Directed Verdict and for Judgment n.o.v. Preserved Their Right to Appeal Under Settled Law.

The Second Circuit was clearly correct in holding that the alleged agreement between Whirlpool and Sears, if made, was not a *per se* violation. Even the dissent agreed there was no proof of competitive harm. Hence, there was *no instruction* which could properly have been given to the jury and it was error to submit the case to the jury at all. This point was preserved for appeal by Respondents' motions for directed verdict and for judgment n.o.v., which the trial court erroneously denied. *House of Koscot Development Corp.* v. *American Line Cosmetics, Inc.*, 468 F. 2d 64, 65-6 (5th Cir. 1972); *Hanson* v. *Ford Motor Co.*, 278 F. 2d 586, 593 (8th Cir. 1960); *Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F. 2d 859, 862 (8th Cir. 1953). There is no such novelty of this proposition or conflict among the lower courts as to require this Court's attention.

CONCLUSION.

For each and all of the foregoing reasons, this Court should decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

BURTON Y. WEITZENFELD
MICHAEL R. TUROFF
STANLEY M. LIPNICK
PATRICK F. GEARY
ARNSTEIN, GLUCK,
WEITZENFELD & MINOW,
Of Counsel
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-7100
Attorneys for Respondent
Whirlpool Corporation

ARTHUR MEDOW
CHARLES A. TAUSCHE
Sears Tower
Chicago, Illinois 60684
(312) 875-9200
Attorneys for Respondent
Sears, Roebuck and Co.